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Supreme Court of the United States

October Term, 1967.

No. 1223

PAUL E. PERRY,
Respondent,

versus

BALTIMORE CONTRACTORS, INC., and NEW AMSTERDAM CASUALTY COMPANY,
Petitioners.

Petition for Writ of Certiorari to the Court of Appeal, First Circuit, State of Louisiana.

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BALTIMORE CONTRACTORS, INC., and NEW AMSTERDAM CASUALTY COMPANY,

Petitioners.

Petition for Writ of Certiorari to the Court of Appeal, First Circuit, State of Louisiana.

MAY IT PLEASE THE COURT:

Baltimore Contractors, Inc. and New Amsterdam Casualty Company, petitioners, pray that a writ of certiorari issue to the Court of Appeal, First Circuit, State of Louisiana.

OPINIONS BELOW.

The opinion of the 17th Judicial District Court, Parish of Terrebonne, State of Louisiana[1] is unreported. The original opinion[2] and the opinion on rehearing

[1] Cf. Appendix A.
[2] Cf. Appendix B.

of the Court of Appeal, First Circuit, State of Louisiana[3] are reported at 202 So. 2d 694. The denial of petitioners' application for certiorari or review by the Supreme Court of Louisiana is reported at 204 So. 2d 579.[4]

STATEMENT OF JURISDICTION.

The judgment of the Court of Appeal, First Circuit, State of Louisiana, sought to be reviewed here was rendered on June 30, 1967. The Court of Appeal, First Circuit, State of Louisiana denied a rehearing on October 4, 1967. The Supreme Court of Louisiana declined to review the case on December 13, 1967.

The jurisdiction of this court is invoked under the provisions of 28 U.S.C. §1257(3).

QUESTIONS PRESENTED.

1. Does the Longshoremen's & Harbor Workers' Compensation Act apply to an accident occurring in a cofferdam?

2. If the Longshoremen's & Harbor Workers' Compensation Act is applicable, is a general contractor, who is liable for compensation because of the failure of a subcontractor to secure the payment of compensation, immune from tort liability to an employee of the subcontractor?

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[3] Cf. Appendix C.
[4] Cf. Appendix D.

3. Assuming, arguendo, that maritime law is applicable, did the court err in failing to award petitioners recovery over against the subcontractor under the principles of maritime indemnity?

STATUTES INVOLVED.

1. The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 et seq., and particularly §§ 904 & 905.[5]

2. The Louisiana Workmen's Compensation Act, L.R.S. 23:1021 et seq., and particularly L.R.S. 23:1061.[6]

3. The Extension of Admiralty Jurisdiction Act, 46 U.S.C.A. §740.[7]

STATEMENT OF THE CASE.

Paul Perry, respondent here, while employed as a diver by Underwater Exploration Co., Inc., (of which Perry was president) third party defendant, and respondent, was injured on October 13, 1958 while working in a cofferdam adjacent to the Intracoastal Canal at Houma, Louisiana. While he was on the bottom of the cofferdam, he was raised out of the water by a crane owned by petitioner Baltimore Contractors, Inc., then lowered to a few feet above the water and released.

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[5] Cf. Appendix E.
[6] Cf. Appendix F.
[7] Cf. Appendix G.

The cofferdam was a rectangle constructed of sheet piling effectively to seal off the waters of the canal so that the floors and walls of a tunnel under the canal could be constructed.[8] The cofferdam was divided into bays which were rectangular areas between 12 and 15 feet in width and from 30-40 feet in length.[9] A diver, such as Perry, could move from one bay to another without surfacing.[10]

On the day in question, Perry had gone down into bay #6 of the cofferdam.[11] While underwater, he crossed over to bay #4 where the crane was digging.[12] Perry's line tender, Picou, an employee of Underwater, and the only man who knew where Perry was while he was underwater,[13] permitted Perry to walk on the mud floor of the cofferdam into Bay #4[14] although he knew, or certainly should have known, that the crane, which was some twenty feet from Picou,[15] was operating in bay # 4.

Petitioners' very first pleading in this action was an exception of no cause or right of action predicated upon their contention that the Louisiana Workmen's Compensation Act was respondent's sole remedy.[16] Subsequent to the filing of this exception, respondent amended his petition and claimed every imaginable

[8] R. 98, 108, 137.
[9] R. 133.
[10] R. 131.
[11] R. 133.
[12] R. 133-134.
[13] R. 160.
[14] R. 163.
[15] R. 160.
[16] R. 10.

remedy from the Jones Act to State Workmen's Compensation.[17] Petitioners later filed answer,[18] and then, sought indemnity from Underwater Exploration Co., Inc. by way of third party petition.[19] When the trial court held that the Longshoremen's Act was applicable, and that petitioners were liable in tort under that Act,[20] petitioners then argued alternatively that if the Longshoremen's Act was applicable, it provided respondent's exclusive remedy.[21]

The trial court found that the Longshoremen's Act was applicable and that petitioners were liable in tort under the Longshoremen's Act.[22] The trial court, in its judgment, did not mention petitioners' claim for indemnity.[23] The Court of Appeal affirmed and also denied petitioners' claim for indemnity.[24] After the Court of Appeal denied a rehearing,[25] the Louisiana Supreme Court denied petitioners' application for writs of review.[26]

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[17] R. 17, 38.
[18] R. 24, 28, 44.
[19] R. 50.
[20] R. 233, 239, Cf. Appendix A.
[21] Cf. Petitioners Brief in Court of Appeal, First Circuit.
[22] Footnote 20, *supra*.
[23] *Ibid.*
[24] Cf. Appendix B.
[25] Cf. Appendix C.
[26] Cf. Appendix D.

ARGUMENT.

Point I. The Louisiana Workmen's Compensation Act is Respondent's Sole and Exclusive Remedy, and Petitioners' Only Liability.

Since respondent Perry's injuries occurred while he was walking on the floor of a cofferdam, completely removed from navigable waters, his sole remedy is provided by the laws of Louisiana, and particularly the Louisiana Workmen's Compensation Act.

It is clear, as both the trial court and the Court of Appeal found, that the injury occurred while respondent Perry was walking on the floor of a cofferdam, an area which had been completely removed from all possibility of navigation. Such areas have consistently been held to be non-navigable, and thus subject to the laws of the state in which they may be located,[27] in this case, the State of Louisiana.

It is likewise clear that under Louisiana law, respondent Perry was the "statutory employee" of petitioner Baltimore.[28] Under the Workmen's Compensation Act of Louisiana, respondent Underwater as subcontractor, operating under Baltimore's supervision,[29] undertook to do part of petitioner Balti-

[27] *Jeffers v. Foundation Co.*, 85 F.2d 24 (2 Cir. 1936); *Millers' Ind. Underwriters v. Braud*, 270 U.S. 59; *Massman Construction Co. v. Bassett*, 30 F.Supp. 813 (D.C.E.D.Mo., 1940), reversed on other grounds, 120 F.2d 230 (8 Cir. 1941); *Central Engineering Co. v. Bassett*, 42 F.Supp. 750 (D.C.S.D.Ill., 1941).

[28] L.R.S. 23:1061, cf. Appendix F.

[29] R. 106, 107.

more's "trade, business or occupation", i.e. the diving operations, in connection with Baltimore's contract to construct a tunnel under the Intracoastal Canal at Houma, Louisiana. The diving operation was a necessary part of Baltimore's operations, since the diver by means of his jet hose could loosen mud from the sides of the cofferdam and could perform other functions which assisted in the digging operations.[30]

It is well settled law in Louisiana that the Compensation Act is the exclusive remedy of a statutory employee against his statutory employer.[31] The statutory employer is specifically made immune from tort liability to the statutory employee.[32]

Before the passage of the Extension of Admiralty Jurisdiction Act,[33] respondent Perry's sole recovery would unquestionably have been under the Louisiana Workmen's Compensation Act, since his accident did not occur on navigable waters.[34] It is further submitted that the Extension of Admiralty Jurisdiction Act did not create any new legal rights, but, as the Ninth Circuit expressed it when upholding the constitutionality of that Act, "the Admiralty Extension Act merely made a new remedy available for an already existing cause of action."[35] The only cause of

[30] Perry's deposition, D 4 at pp. 2, 6.
[31] *Thibodeaux v. Sun Oil Co.*, 218 La. 453, 49 So.2d 852 (1950); *Meche v. Farmers Drier & Storage Co.*, 193 So.2d 807 (La. App. 1967), *writ ref.*, 250 La. 369, 195 So.2d 644 (1967).
[32] *Ibid.*
[33] 46 U.S.C.A. §740, Cf. Appendix G.
[34] *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179.
[35] *U. S. v. Matson Navigation Co.*, 201 F.2d 610, 617 (9 Cir. 1953).

action which respondent has is that under the Louisiana Workmen's Compensation Act. The Extension of Admiralty Jurisdiction Act, *supra*, gives him no additional substantive rights.

In *American Export Lines, Inc. v. Revel*,[36] plaintiff was injured on a dock when, because of a defective ship's winch, cargo fell and hit him. After a thorough consideration of the law, the court concluded that the plaintiff's remedies were solely under local law, citing *Swanson v. Marra Bros.*,[37] and *State Industrial Commission v. Nordenholdt Corp.*,[38] among other authorities. The court went on to say that local law applied ". . . even though the Congress has embraced such cases within the maritime jurisdiction of the United States,"[39] by the Extension of Admiralty Jurisdiction Act.

The reliance by the Court of Appeals on *Gutierrez v. Waterman Steamship Corp.*,[40] is, we submit, misplaced. In *Gutierrez*, the work in progress (discharging a ship), was clearly maritime. In the case at bar, both the locale and the work in progress (constructing a tunnel under a canal) were clearly non-maritime.

It is submitted that petitioners' sole liability under the facts of this case is that prescribed by the Louisiana Workmen's Compensation Act.

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[36] 266 F.2d 82 (4 Cir. 1959).
[37] 328 U.S. 1.
[38] 259 U.S. 263.
[39] *American Export Lines v. Revel, supra,* at p. 84.
[40] 373 U.S. 206, *reh. den.* 374 U.S. 858.

Point II. Assuming the Applicability of the Longshoremen's Act, that Act is Respondent's Sole Remedy and Petitioners' Sole and Exclusive Liability.

The court below found that the Longshoremen's Act applied to the facts of this case, but failed to recognize that if that Act applied, the benefits thereunder provided respondent Perry's sole remedy against petitioners.

As shown above, respondent Perry was the employee of a subcontractor (Underwater) of petitioner Baltimore. The record shows that the subcontractor had failed to procure compensation insurance in accordance with the provisions of the Longshoremen's Act.[41]

Section 4 of the Longshoremen's Act[42] provides as follows:

> "(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. *In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.*" (Emphasis added.)

[41] R. 189, Cf. 202 So.2d 694 at 697-698.
[42] 33 U.S.C.A. §904.

Since the subcontractor failed to secure the payment of compensation, petitioners became liable under Section 4 for the payment of compensation to Perry.

Section 5 of the Longshoremen's Act provides in part as follows:[43]

> "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . ."

In a situation such as the case at bar, where the contractor is made liable for compensation under Section 4 of the Act, he is granted the immunity from a tort action provided by Section 5. Although Sections 4 and 5 of the Longshoremen's Act have not been judicially construed in a situation where the subcontractor failed to secure the payment of insurance, Judge Holtzoff in *Thomas v. George Hyman Construction Co.*,[44] discussed this situation as follows:

> "The law does not accord to the general contractor the choice of either carrying workmen's

[43] 33 U.S.C.A. §905.

[44] 173 F.Supp. 381, 383 (D.C.D.C. 1959), *Probst v. Southern Stevedoring Co.*, 379 F.2d 763 (5 Cir. 1967), at first reading would seem to be a case in point. A reading of the record of this case will disclose, however, that in *Probst* the subcontractor had procured the necessary compensation insurance so that the contractor was not liable for compensation under Section 4 of the Longshoremen's Act to the injured employee of the subcontractor.

compensation insurance, or subjecting himself to liability for negligence. The law requires him to carry insurance only if the subcontractor fails to do so. In such a contingency, the general contractor may well be free of all other liability if he in fact carried such insurance."

Where the contractor is made liable for the payment of compensation under Section 4, it is necessary that the contractor be granted immunity from a tort action to maintain the constitutionality of that section of the act. In *New York Central Railroad Company v. White*,[45] this Court established the criteria for upholding the constitutionality of the workmen's compensation scheme: The Workmen's Compensation Act deprives the employer or the contractor of some rights, makes them liable without fault, and takes away from them various defenses. Similarly, it takes away the right of the employee to recover damages for an injury sustained in the course of employment. The court stated, however, that the very basis of the constitutionality of the Act was that the employer or contractor and the employee received a *quid pro quo*.[46] To the same effect, see the comments of both the majority and minority in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*[47] If the contractor in this case is to be made liable for the payment of compensation, and thus liable without fault, he must have his *quid pro quo* of immunity from tort liability in order for Section 4 of the Longshoremen's Act to be

[45] 243 U.S. 188.
[46] *Ibid.*, at 203-204.
[47] 350 U.S. 124.

constitutional under the criteria established in *White* and *Ryan*.

Nor can the constitutionality of such a provision be upheld on the basis that the contractor in such a case would receive a credit for compensation paid against any tort recovery. For what of the situation where the contractor was not negligent but has paid compensation? Where then is the *quid pro quo?* And what of the case where the compensation liability is greater than the damages awarded in the compensation action?

In the vast majority of jurisdictions in which contractors are subjected to compensation liability to employees of subcontractors, the contractors are immune from tort liability.[48] Professor Larson properly criticizes the contrary ruling in the states of New York and Wisconsin as follows:[49]

> "The most extreme holding on this point is the Wisconsin and New York ruling that the general contractor remains liable to a common law suit even if he is also liable for compensation, his only comfort being that the amount of the compensation is deducted from the damages to prevent a double recovery. The theory of this extraordinary holding is that the general contractor does not in any sense become the 'employer'; he is rather an insurer of the subcontractor's compen-

[48] Larson, "The Law of Workmen's Compensation," Matthew Bender & Co., Inc., (1961 Ed.) Vol. 2, P. 175.
[49] *Ibid.*, at 176-177.

sation obligations. This looks like a case of preoccupation with labels at the expense of substance. The general contractor, like the immediate employer, is subjected to non-fault liability compensation, whether you call him a statutory employer or insurer or anything else; and he ought in return to get immunity from damage suits."

In order to overcome the exclusiveness of liability provisions of Section 5 of the Longshoremen's Act, the Court of Appeal construed *Jackson v. Lykes Bros. Steamship Co., Inc.*,[50] as emasculating the exclusivity provisions of Section 5 of the Longshoremen's Act. It is respectfully submitted that *Jackson* did no such thing.[51] While *Jackson* certainly did except from the provisions of Section 5 situations involving suits by longshoremen against their employers who were also shipowners, *Jackson* was seeking to maintain uniformity of rights for a particular class of workers, longshoremen. *Jackson* thus held that the rights of a longshoreman to maritime tort recovery should not be defeated simply because his employer also happened to own the ship. A contrary holding, the court felt, would give such longshoremen lesser rights than their fellow longshoremen whose employer did not own the ship on which they were working when injured. Certainly this court did not intend by its decision in *Jackson* to repeal Section 5 of the Longshoremen's Act.

[50] 386 U.S. 731.

[51] Cf. *Biggs v. Norfolk Dredging Co.*, 360 F.2d 360 (4 Cir. 1966) commenting on the effect of *Reed v. SS YAKA*, 373 U.S. 410, *Jackson's* predecessor, on Section 5 of the Longshoremen's Act.

The factual situation and the underlying policy considerations in *Jackson* and in the case at bar are essentially different. Maintenance of the exclusivity provisions of Section 5 in this case would affect all workers similarly situated and would not effect a disparity of the rights of any such workers. Clearly, maintenance of the exclusivity provisions in this case would deprive the injured party of a tort remedy against the general contractor (although in this instance he would have a tort action under Section 5 of the Longshoremen's Act against the subcontractor for its failure to secure compensation). But it would also constitutionally achieve the purposes of the Longshoremen's Act, i.e., to insure that an injured worker is compensated regardless of fault.

In conclusion, if the Longshoremen's Act is applicable, it is respondent Perry's only remedy against petitioners.

Point III. The Courts Below Erred in Failing to Grant Petitioners' Claim for Indemnity.

The Court of Appeal denied petitioners' indemnity claim on the grounds that there was no negligence of any of the employees of Underwater.[52] Assuming respondent Perry can recover in maritime tort, it is respectfully submitted that the court below erred first in not applying proper principles of maritime indemnity, and secondly in not finding that Underwater and Perry had breached their warranty of workmanlike service.

[52] Appendix C.

Petitioners' rights to indemnity are not founded upon tort or negligence standards as the court below erroneously thought, but are based on respondent's contractual warranty of workmanlike service, and are governed by general principles of maritime indemnity actions.[53]

The record shows that Perry had a line tender, Picou, to assist him in the diving operations. It was Picou's job to assist Perry in the diving by notifying him of any danger, by pulling Perry out of the water in the event that Perry notified him of any emergency, by making sure that Perry was not in an area of danger, and the like.[54] Picou was standing about 20 feet from the base of the crane which ultimately picked Perry up.[55] Picou was the only man who could know at the time of this accident exactly where Perry was.[56] Perry could not be seen while underwater.[57] It is Picou's testimony that he did not know that the crane was digging in the area where Perry was when he was scooped up.[58] In the first place, this is absolutely incredible since, as stated, he was 20 feet away from the base of the crane.[59] But even accepting his testimony as true, this would prove that he did not perform his work in a workmanlike

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[53] *Ryan Stevedoring Corp. v. Pan-Atlantic Steamship Corp., supra; Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315; *Alcoa SS Co. v. Chas. Ferran & Co.*, 383 F.2d 46 (5 Cir. 1967).

[54] R. 134.

[55] R. 160.

[56] *Ibid.*

[57] *Ibid.*

[58] R. 159-161, 164.

[59] Cf. footnote 55.

manner, because it was his duty to know where the crane was in order that he could notify the crane where Perry was,[60] and notify Perry where the crane was,[61] to avoid just such an accident as eventually occurred. It was thus manifest error for the court first to apply a negligence standard, and then to find that Picou's actions did not as a matter of law constitute a breach of the warranty of workmanlike service of Underwater. Proper application of this principle clearly would have resulted in petitioners' recovery of indemnity from Underwater Exploration Co., Inc.

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[60] R. 163.
[61] *Ibid.*

CONCLUSION.

In conclusion, it is respectfully submitted that this Honorable Court should direct a writ of certiorari to the First Circuit Court of Appeal, State of Louisiana, to review its decision in this matter which wrongfully applies the Longshoremen's and Harbor Workers' Compensation Act where the state compensation act should apply, which fails to enforce the exclusivity provisions of the Longshoremen's Act, if applicable, and in failing to apply the principles of maritime indemnity.

Respectfully submitted,

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CERTIFICATE.

I, G. Edward Merritt, a member of the bar of this Court, do hereby certify that I have this day served a copy of the above and foregoing application to respondents' counsel of record, Messrs. Norman & Norman, by mailing a copy thereof, postage prepaid, to them at their offices at New Orleans, Louisiana on this .... day of March, 1968.

G. EDWARD MERRITT

APPENDIX A.

I. JUDGMENT OF 17TH JUDICIAL DISTRICT COURT, PARISH OF TERREBONNE, STATE OF LOUISIANA:

17TH JUDICIAL DISTRICT COURT
PARISH OF TERREBONNE
STATE OF LOUISIANA

No. 19,979

PAUL E. PERRY
versus
BALTIMORE CONTRACTORS, INC., ET AL

JUDGMENT

For the written reasons this day assigned;

It is ordered, adjudged, and decreed that there be judgment in favor of plaintiff, Paul E. Perry, and against the defendant, Baltimore Contractors, Inc. and New Amsterdam Casualty Company, jointly and in solido in the full sum of Forty-Four Thousand Ninety-Two and 55/100 Dollars ($44,092.55), with legal interest thereon from the date of judicial demand until paid and for all cost of these proceedings.

Thus done and rendered, read and signed, in open Court at Houma, Parish of Terrebonne, Louisiana, on this 19th day of September, A. D., 1966.

(S) J. LOUIS WATKINS
(J. Louis Watkins),
Judge, 17th Judicial District
Court

II. REASONS FOR JUDGMENT OF 17TH JUDICIAL DISTRICT COURT, PARISH OF TERREBONNE, STATE OF LOUISIANA:

17TH JUDICIAL DISTRICT COURT
PARISH OF TERREBONNE
STATE OF LOUISIANA

No. 19,979

PAUL E. PERRY
versus
BALTIMORE CONTRACTORS, INC., ET AL

REASONS FOR JUDGMENT

This suit was initially brought by Paul E. Perry against Baltimore Contractors, Inc., New Amsterdam Casualty Company, its insurer, and Ray Ledet, an employee of Baltimore Contractors, Inc. for injuries sustained October 13, 1959, when he was scooped up from a coffer dam in the waters of the Intracoastal Canal by a clamshell bucket operated by Ledet. Baltimore and its insurer filed exceptions of no cause or right of action on the ground that plaintiff alleged himself to be an employee of Underwater Exploration Company, Inc., a subcontractor of Baltimore and he was injured as a result of the negligence of Ledet, an employee of Baltimore, and that therefore the sole liability of Baltimore, if any to the plaintiff, is under the provisions of the Louisiana Workmen's Compensation Act LSA-R.S. 22-1061.

The plaintiff thereupon amended his petition alleging in the alternative that if he were found to be an employee of Baltimore then he is entitled to workmen's compensation under the statute mentioned.

The answer of the defendant is in substance a general denial, but further avers the accident to have been the result of the negligence of plaintiff himself or that of Brian Picou, plaintiff's tender in his diving operation, and further in the alternative that plaintiff assumed the risk of the accident upon which he sues.

The plaintiff then filed a supplemental petition alleging that the accident occurred on the navigable waters of the State of Louisiana and of the United States and this action is brought against the defendants as third parties under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, etc.; that in the alternative the accident was the result of a Maritime Tort, that plaintiff was an employee pro hoc vice of Baltimore and is entitled to sue under the provisions of the Merchant Marine Act of 1920 (Jones Act) 46 U.S.C. 688 and that he was a seaman and a member of the crew of the vessel Whirly II operated by Baltimore; and that if plaintiff was found not to be an employee pro hoc vice of Baltimore and not entitled to benefits under the Jones Act, then he is entitled to compensation under the Louisiana Workmen's Compensation Act.

Baltimore and New Amsterdam then filed a third party proceeding against Underwater and its President Paul E. Perry, averring that plaintiff was an employee of Underwater, a subcontractor of Baltimore, and therefore Baltimore, as principal contractor and New Amsterdam, its insurer, are entitled to indemnity from Underwater as its subcontractor for any compensation benefits which it might be called upon to pay plaintiff as the employee of the subcontractor; and that Perry as President and sole shareholder of Underwater was personally responsible by the obligation of Underwater to obtain workmen's compensation and general liability insurance, and that if Baltimore and New Amsterdam are unable to effect indemnity from Underwater, they pray for judgment and indemnity from Perry.

The record shows that Baltimore Contractors, Inc. was the general contractor engaged in the construction of the Houma Tunnel under the Intracoastal Canal at Houma; that a necessary incident of the operation was the use of a coffer dam constructed of sheet piling supported by wooden crossbeams, like a metal box with no top and bottom; that the purpose of a coffer dam was to faciliate work inside of it on the former bed of the Intracoastal to prepare the floor and walls of a tunnel; that the coffer dam was completely enclosed on all sides; that it was divided into bays, roughly rectangular in shape, each estimated to measure from 12 to 15 feet in width and from 30 to 40 feet in length; that the respective bays were separated from one another only by crossbeams; and

that divers moved from one bay to another by moving through the crossbeams without emerging from the water.

Plaintiff was a diver and an employee of Underwater Exploration Company, Inc., of which he was the President and principal stockholder, and which had an oral contract with Baltimore to perform the diving operations for the construction of the project; that the work of the diver consisted primarily of "hand jetting" mud from the side of the coffer dam, which was picked up along with mud from the bottom of the coffer dam by a clam bucket attached to a crane on a barge named "Whirly II", which was owned by Baltimore and was afloat on the Intracoastal Canal immediately outside of the coffer dam; that the air compressor unit attached to plaintiff's diving apparatus was attached to the barge and under the control of Byron Picou, plaintiff's tender in his diving operation; and that the entire operation was under the supervision and direction of Miles Spinney, a superintendent of Baltimore.

Underwater, through Perry, contracted with Baltimore on or about October 9, 1959 to perform the necessary diving operations. When the contract was entered into Perry or Underwater applied for insurance and workmen's compensation and tendered a deposit for that purpose. It developed that the insurance applied for only became effective on October 15, 1959. Meanwhile, Perry went to work under his contract before producing any policies, and it was stated

by Spinney that Baltimore had sufficient insurance to cover operations until the policies were delivered. The accident occurred on October 13, 1959.

It is established with reasonable certainty that the general practice was that no digging operations would be performed while a diver was in the water; and such was the general knowledge and understanding on this particular operation. It was the practice generally, and the practice in this case, for a diver to move from one bay to another in the performance of his duties, and such movement from one bay to another usually took place under water and was not apparent on the surface of the water; and such movement could hardly be known to any one on or above the surface except the diver's tender, who would release or take in lines attached to the diver in accordance with the diver's movements.

In this case it was known to everybody, with the possibly exception of Miles Spinney, that the diver had descended into the water; and it is the testimony of plaintiff that he descended at about 1:00 P.M. on the instructions of Spinney. The testimony indicates that he went into bay No. 6 and that thereafter he moved into bay No. 4. Meanwhile, a new crane operator took over that part of the job, and practiced for awhile the movement of the crane and the operation of the clam bucket. He was then given instructions to begin digging. He did so and removed a bucket of dirt from bay No. 4 and deposited it on the barge. Before dropping the bucket a second time, his testimony is

that, being aware of the presence of a diver in the water, he attempted to signal that information to Spinney, who nevertheless signaled him to dig. He undertook to do so and on his second operation picked up Perry with his bucket, thereby causing injuries.

We have reviewed numerous State and Federal cases, and particularly Federal cases covering all of the several phases of Maritime Law. We can find no profit in analyzing in detail here any of the holdings in said cases or the distinctions they draw. We believe it to be sufficient to hold the case of Calbeck v. Travelers Insurance Company, 370 U.S. 114, 82 S.Ct. 1196 (1962), is applicable to the facts of this case, as we have found them hereinabove. That case holds that Longshoremen's and Harbor Workers' Compensation Act, Section 3(a), 33 U.S.C.A., Section 903(a), is applicable here; and that "There emerges from the complete legislative history a congressional desire for a statute which would provide federal compensation for all injuries to employees on navigable waters;—The statute's framers adopted this scheme in the Act because they meant to assure the existence of a compensation remedy for every such injury, without leaving employees at the mercy of the uncertainty, expense, and delay of fighting out in litigation whether their particular cases fell within or without state acts under the 'local concern' doctrine." (Page 1200) "Congress brought under the coverage of the Act all such injuries whether or not a particular one was also within the constitutional reach of a state workmen's compensation law." (Page 1203) "In the application of the act, therefore, the broadest ground it permits should be taken." (Page 1205)

It is quite clear that the plaintiff endured a substantial amount of physical pain and suffering and mental anguish. Indeed, his experience of being grabbed by the jaws of a clam shell bucket underwater must have been terrifying. And the fact that he suffers a disability which will permanently deprive him of earning a part of his livelihood as a "deep sea diver", for which he was thoroughly qualified, must necessarily be a source of continuing concern. We estimate this area of the damages he suffered to be worth Seven Thousand Dollars ($7,000.00).

The medical expenses were shown to be Four Hundred Sixty-Eight and 95/100 Dollars ($468.95), and the loss of earnings to be Sixteen Thousand, Six Hundred Twenty-Three and 60/100 Dollars ($16,623.60).

The loss of future earnings as a deep sea diver, the opportunity for which is now permanently lost, is difficult to determine. Incidently, his inability to do deep sea diving could conceivably affect his opportunity for employment as a diver where both shallow diving and deep sea diving are required. We estimate his loss of future earnings at Twenty Thousand Dollars ($20,000.00).

(S) J. LOUIS WATKINS
(J. Louis Watkins),
Judge, 17th Judicial District
Court

September 19 1966

APPENDIX B.

OPINION OF COURT OF APPEAL, FIRST CIRCUIT, STATE OF LOUISIANA:

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

Number 7051

PAUL E. PERRY
versus
BALTIMORE CONTRACTORS, INC., ET AL

Appealed from the Seventeenth Judicial District Court, Parish of Terrebonne, State of Louisiana, Honorable J. Louis Watkins, Judge Presiding.

Before LOTTINGER, REID and SARTAIN, JJ

REID, J.: This is a suit for injuries allegedly sustained by plaintiff, Paul E. Perry, a diver employed by Underwater Exploration, Inc. The defendants are Baltimore Contractors, Inc., New Amsterdam Casualty Company, its insurer, and Ray Ledet, one of its employees.

Plaintiff's petition alleges that on or about October 13, 1958, he was employed by the Underwater Exploration Company, Inc. as a diver, diving for the company in the Intracoastal Canal in Houma, Terrebonne Parish, Louisiana, at the intended site of the

tunnel to be built under the Intracoastal Canal. He alleges that while he was beneath the water, an employee of Baltimore Contractors, Inc. who was operating a crane on a barge owned by defendant Baltimore Contractors, Inc., scooped plaintiff up from the bottom of the Canal by a clam shell bucket and raised him approximately 14 feet above water level and after a short time, dropped him back into the water. Plaintiff prays for $20,000.00 for pain, suffering and anguish, $281.63 medical expenses, and $100,000.00 for future pain and suffering, medical expenses, and future loss of wages.

Baltimore Contractors, Inc. and New Amsterdam Casualty Company filed an exception of no cause or right of action on the grounds that plaintiff was an employee of Underwater Exploration Company, Inc., a subcontractor of Baltimore Contractors, Inc. and that he was injured as a result of the negligence of Ray Ledet, an employee of Baltimore and therefore the sole liability of Baltimore, if any, to the plaintiff is under the provisions of the Louisiana Workmen's Compensation Act, particularly R.S. 22:1061, et seq.

Plaintiff amended his petition to further allege alternatively that in the event the Court found petitioner was at the time of the accident an employee of Baltimore Contractors, Inc., that he was entitled to compensation under the laws of the Louisiana Workmen's Compensation Statutes.

Baltimore Contractors, Inc. and New Amsterdam Casualty Company then filed an exception of vague-

ness on the grounds that plaintiff's supplemental petition alleged he was "gainfully employed", but failed to allege the name of his employer.

All of the exceptions were tried and the exception of vagueness was overruled and the exception of no right and no cause of action was referred to the merits.

The two corporate defendants then filed answers to plaintiff's original petition and supplemental petition admitting the New Amsterdam Casualty Company comprehensive general liability insurance in favor of Baltimore Contractors, Inc. but denied that Ray Ledet was an insured within the coverage provisions of the policy. They allege negligence on the part of plaintiff and alternatively that the sole and exclusive cause of the accident was the negligence of one Brian Picou, plaintiff's tender, an employee of plaintiff acting in the course and scope of his employment.

Plaintiff filed a second supplemental and amended petition alleging that the accident in question occurred on the navigable waters of the State of Louisiana and of the United States, and the action is brought against the defendants as third parties under the provisions of the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. 901, et seq., and in the alternative prayed that he be adjudged a seaman and have judgment against the defendants in the sum of $127,141.63, plus maintenance and cure, with legal interest and costs, all of which was denied by Baltimore Contractors and New Amsterdam Casualty Company in their answer.

Baltimore Contractors, Inc. and New Amsterdam Casualty Company then filed a third party action against Underwater Exploration Company, Inc. and its president, Paul E. Perry, averring that if plaintiff Paul E. Perry is entitled to any relief against Baltimore Contractors, Inc. and New Amsterdam Casualty Company, such relief is under the Louisiana Workmen's Compensation Act and therefore under the provisions of R.S. 23:1063, Baltimore Contractors, Inc. as principal contractor, and New Amsterdam Casualty Company as insurer, are entitled to indemnity from Underwater Exploration Company, Inc., a subcontractor of Baltimore Contractors, Inc., and employer of plaintiff, for any compensation benefits Baltimore and New Amsterdam might be called on to pay. They further aver that since Paul E. Perry was the President and sole shareholder of Underwater Exploration Company, Inc. and as such, personally responsible for the obligation of Underwater Exploration Company, Inc. to obtain workmen's compensation and general liability insurance covering the company's liabilities, that if third party plaintiffs are unable to effect indemnity from Underwater Exploration Company, Inc., they should be entitled to recover judgment of indemnity from Paul E. Perry. Paul E. Perry filed an exception of vagueness and of no cause or right of action to the third party petition, which exception was referred to the merits.

For written reasons assigned, the Lower Court rendered judgment in favor of plaintiff and against Baltimore Contractors, Inc. and New Amsterdam

Casualty Company, jointly and in solido in the sum of $44,092.55, with interest and costs, from which judgment the said two defendants appealed.

In regard to the facts concerning the accident, the trial judge in his reasons for judgment states the facts in great detail and accurately.

> "The record shows that Baltimore Contractors, Inc. was the general contractor engaged in the construction of the Houma Tunnel under the Intracoastal Canal st Houma; that a necessary incident of the operation was the use of a coffer dam constructed of sheet piling supported by wooden crossbeams, like a metal box with no top and bottom; that the purpose of a cofferdam was to facilitate work inside of it on the former bed of the Intracoastal to prepare the floor and walls of a tunnel; that the cofferdam was completely enclosed on all sides; that it was divided into bays, roughly rectangular in shape, each estimated to measure from 12 to 15 feet in width and from 30 to 40 feet in length; that the respective bays were separated from one another only by crossbeams; and that divers moved from one bay to another by moving through the crossbeams without emerging from the water.
>
> "Plaintiff was a diver and an employee of Underwater Exploration Company, Inc., of which he was the President and principal stockholder, and which had an oral contract with Baltimore

to perform the diving operations for the construction of the project; that the work of the diver consisted primarily of 'hand jetting' mud from the side of the cofferdam, which was picked up along with mud from the bottom of the coffer dam by a clam bucket attached to a crane on a barge named 'Whirly II', which was owned by Baltimore and was afloat on the Intracoastal Canal immediately outside of the coffer dam; that the air compressor unit attached to plaintiff's diving apparatus was attached to the barge and under the control of Byron Picou, plaintiff's tender in his diving operation; and that the entire operation was under the supervision and direction of Miles Spinney, a superintendent of Baltimore.

"Underwater, through Perry, contracted with Baltimore on or about October 9, 1959, to perform the necessary diving operations. When the contract was entered into Perry or Underwater applied for insurance and workmen's compensation and tendered a deposit for that purpose. It developed that the insurance applied for only became effective on October 15, 1959. Meanwhile, Perry went to work under his contract before producing any policies, and it was stated by Spinney that Baltimore had sufficient insurance to cover operations until the policies were delivered. The accident occurred on October 13, 1959.

"It is established with reasonable certainty that the general practice was that no digging op-

erations would be performed while a diver was in the water; and such was the general knowledge and understanding on this particular operation. It was the practice generally, and the practice in this case, for a diver to move from one bay to another in the performance of his duties, and such movement from one bay to another usually took place under water and was not apparent on the surface of the water; and such movement could hardly be known to any one on or above the surface except the diver's tender, who would release or take in lines attached to the diver in accordance with the diver's movements.

"In this case it was known to everybody, with the possibly exception of Miles Spinney, that the diver had descended into the water; and it is the testimony of plaintiff that he descended at about 1:00 P.M. on the instructions of Spinney. The testimony indicates that he went into bay No. 6 and that thereafter he moved into bay No. 4. Meanwhile, a new crane operator took over that part of the job, and practiced for awhile the movement of the crane and the operation of the clam bucket. He was then given instructions to begin digging. He did so and removed a bucket of dirt from bay No. 4 and deposited it on the barge. Before dropping the bucket a second time, his testimony is that, being aware of the presence of a diver in the water, he attempted to signal that information to Spinney, who nevertheless signaled him to dig. He undertook to do so and on his

second operation picked up Perry with his bucket, thereby causing injuries."

Examination of the facts in this case clearly shows that the trial Judge was correct in his findings.

We would like to point out that there is some dispute in the facts as to the question of insurance. The testimony of the plaintiff was to the effect that Miles Spinney, Superintendent for the defendant, Baltimore Contractors, Inc., had entered into an oral agreement with plaintiff's corporation and, as stated in the testimony by the plaintiff, Spinney said that Underwater Exploration Company, Inc. would be covered by Baltimore's workmen's compensation and general liability insurance policy. It is admitted by the defendants in their brief that the oral contract between the parties "expressed the intention of the parties to get the work done without any repetition of a series of delays caused by early failures of other divers." The record shows the insurance coverage for Underwater went into effect on October 15, 1959, subsequent to the accident. Although the trial Judge indicates in his reasons for judgment that it was stated by Spinney that the boy bought sufficient insurance to cover operations, this was a statement by the plaintiff. It should be pointed out that the defendants' brief makes mention of a deposition by Spinney, and the minute entry shows that on March 18, the last day of the trial of the case, the court was informed that one witness for the defendants, namely, the said Miles Spinney, was absent, in the state of Maryland, and his testimony would have to

be taken by deposition. The matter was then held open for the taking of the deposition and the right was reserved to counsel for the defendants for rebuttal on the said testimony by deposition. There is nothing in the records, however, which indicates that the deposition was taken or was filed in the record, despite the fact that the defendants' brief cites the deposition of Spinney in several places. In view of the fact that this deposition is not in the record that came before this Court and does not appear anywhere in the index of the record, and was apparently not filed, this Court has no alternative but to ignore the reference to the deposition of Spinney, and, in view of the uncontradicted testimony of the plaintiff in the record, we must accept as correct the trial Court's opinion in this regard that the plaintiff went to work with the consent and knowledge of the defendant prior to his producing evidence of insurance. We might point out that the record in its entirety shows that in all probability this was the case.

We feel that it is important to quote the following from the trial Judge's holdings due to the fact that there is a question as to the interpretation to be placed on the trial Judge's written reasons for judgment.

> "We have reviewed numerous State and Federal cases, and particularly Federal cases covering all of the several phases of Maritime Law. We can find no profit in analyzing in detail here any of the holdings in said cases or the distinctions they draw. We believe it to be sufficient to hold

the case of Calbeck v. Travelers Insurance Company, 370 U. S. 114, 82 S.Ct. 1196 (1962), is applicable to the facts of this case, as we have found them hereinabove. That case holds that Longshoremen's and Harbor Workers' Compensation Act, Section 3(a), 33 U.S.C.A., Section 903(a), is applicable here; and that 'There emerges from the complete legislative history a congressional desire for a statute which would provide federal compensation for all injuries to employees on navigable waters;—The statute's framers adopted this scheme in the Act because they meant to assure the existence of a compensation remedy for every such injury, without leaving employees at the mercy of the uncertainty, expense, and delay of fighting out in litigation whether their particular cases fell within or without state acts under the "local concern" doctrine.' (Page 1200) 'Congress brought under the coverage of the Act all such injuries whether or not a particular one was also within the constitutional reach of a state workmen's compensation law.' (Page 1203) 'In the application of the act, therefore, the broadest ground it permits should be taken.' (Page 1205)"

The defendants set forth five specifications of error as follows:

"I. The trial court erred in failing to apply the governing law, the Louisiana Workmen's Compensation statute, R.S. 23:1061 et seq.

II. The trial court erred, having determined that the Longshoremen and Harbor Worker's Compensation Act applied, in allowing a tort recovery of $44,092.55, when the plaintiff's only remedy was Longshoremen and Harbor Worker's Compensation Act benefits.

III. The trial court erred, having determined that the Longshoremen and Harbor Worker's Compensation Act applied, in failing to dismiss the suit.

IV. The trial court erred in awarding the plaintiff, a diver hospitalized for only two days, the excessive sum of $44,092.55.

V. The trial court erred in not ordering indemnification of the general contractor by the subcontractor."

Before discussing the first specification of error, we would like to point out that the defendants' brief indicates that the trial Judge's ruling that the Longshoremen's and Harbor Workers' Compensation Act applied to this case, had the effect of holding that the State Court was divested of all jurisdiction since the adjudication of a claim under the Longshoremen's Act must be handled solely by the administrative agency set up under the Act. This is, of course, without merit, and what the trial Judge intended, as is clear from his opinion, was that it was the plaintiff's contention that an accident arose out of Mari-

time tort and that, therefore, the Longshoremen's Act rather than the Louisiana Workmen's Compensation Act applied in determining any right which plaintiff might have against the third party. As pointed out in defendant's brief, the trial Judge is well aware of this fact, having referred to the defendants as third parties and having rendered a judgment in damages.

Defendants' first contention is that only the Louisiana Workmen's Compensation Act applies and that the third party remedy under the Longshoremen's & Harbor Workers' Act does not apply. The trial Judge held that under the case of *Calbeck v. Travelers Insurance Company*, 370 U. S. 114, 82 S. Ct. 1196 (1962), the Plaintiff was entitled to recover again under the provisions of this Act, and that under this case, the Louisiana Workmen's Compensation Act was not the exclusive remedy, but that the plaintiff felt within the scope of the Longshoremen's & Harbor Workers' Compensation Act. The defendants' brief concedes that Calbeck is a departure from the prior jurisprudence stating that the prior jurisprudence was to the effect that a Maritime worker injured in an accident occurring upon navigable waters and whose duties were maritime, but primarily local, was barred from the Longshoremen's Act and had to sue under local system of state workmen's compensation. There is no question but the Calbeck case is a departure and, as stated by the defendants, abolishes to a great extent much of the jurisprudence that had grown up under the so-called "Twilight Zone" doctrine.

It should be pointed out that in cases such as this, there is a general proposition, as set forth in the case of *Matherne v. Superior Oil Company,* 207 F.Supp. 591 (E.D.LA. 1962), that "Whether the Louisiana Statute is exclusive for compensation purposes is immaterial so long as maritime jurisdiction is properly invoked."

Title 46, Sections 740, the U. S. Code (Admiralty Extension Act) provides as follows:

> "The admiralty and maritime jurisdiction in the United States shall extend to and include all cases of damage or injury, to persons or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land * * *."

The plaintiff contends, of course, that the Whirly II was a vessel within the contemplation of the maritime law and with this opinion, we are in agreement. There is no question, as mentioned above, that as a result of *Calbeck v. Travelers Insurance Company, supra,* the Longshoremen's Act is intended to be co-extensive with federal maritime and admiralty jurisdiction.

> "* * * It is sufficient to say that Congress intended the compensation act to have a coverage co-extensive with the limits of its authority and that the provision 'if recovery * * * may not validly be provided by State law' was placed in the act not as a relinquishment of any part of the

field which Congress could validly occupy but only to save the act from judicial condemnation, by making it clear that it did not intend to legislate beyond its constitutional powers. * * * *In the application of the act, therefore, the broadest ground it permits of should be taken.*" 82 S.Ct. at 1205. (Emphasis supplied)"

The distinction between work of local concern and work under general maritime law has been completely abrogated by the case of *Calbeck v. Travelers Insurance Company, supra,* thus:

"There emerges from the complete legislative history a congressional desire for a Statute which would provide federal compensation for all injuries to employees on navigable waters;—The statute's framers adopted this scheme in the Act because they meant to assure the existence of a compensation remedy for every such injury, without leaving employees at the mercy of the uncertainty, expense, and delay of fighting out in litigation whether their particular cases fell within or without state acts under the 'local concern' doctrine.'[(Page 1200) "Congress brought under the coverage of the Act all such injuries whether or not a particular one was also within the constitutional reach of a state workmen's compensation law." 82 S.Ct. at 1203"

Although the defendants mention that the Calbeck case reads out of the act the necessity for sole cover-

age by the Longshoremen's Act and abolishes to a great extent the "Twilight Zone", the defendants contend the Calbeck case does not read out of the act a requirement of occurring upon navigable waters and quote Sec. 903 of the act to the effect that the injury must occur upon navigable waters, and state that the plaintiffs in the *Calbeck* case were injured while completing construction of vessels which were afloat on the navigable waters and, thus were found to be within the coverage of the act. Defendants then contend that as Perry was working inside a cofferdam, an enclosed boxlike area, at the time of the accident, he was not working in navigable waters, and cite various cases to have held that a diver working in a cofferdam must recover under the State Workmen's Compensation Statute. Be that as it may, the barge upon which the clam bucket was dropped into the cofferdam, was clearly on navigable waters. It is the opinion of this Court, however, that the case of *Guiterrez v. Waterman Steamship Corporation*, 373 U. S. 206, 83 S.Ct. 1185 (1963) makes it unimportant whether or not the water in the cofferdam should be or should not be decreed to be navigable waters. In that case, a longshoreman sued the vessel owner for injuries sustained on the dock and the court held as follows:

> "Respondent contends that it is not liable, at least in admiralty, because the impact of its alleged lack of care or unseaworthiness was felt on the pier rather than aboard ship. Whatever validity this proposition may have had until 1948,

> the passage of the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U.S.C. & 740, swept it away when it made vessels on navigable water liable for damage or injury 'notwithstanding that such damage or injury be done or consummated on land.' Respondent and the carrier amici curiae would have the statute limited to injuries actually caused by the physical agency of the vessel or a particular part of it—such as when the ship rams a bridge or when its defective winch drops some cargo onto a longshoreman. * * * Nothing in the legislative history support so restrictive an interpretation of the statutory language. *There is no distinction in admiralty between torts committed by the ship itself and by the ship's* personnel while operating it * * *." (Emphasis supplied). 83 S.Ct. at 1188."

We, therefore, do not see any merit in defendants' first allegation that the Louisiana Workmen's Compensation Act should apply, and not the Longshoremen's Act which we feel is applicable.

Defendant's second allegation of error is that assuming, which defendant is not, that the Louisiana Workmen's Compensation Act is not plaintiff's exclusive remedy and that the Longshoremen's & Harbor Workers' Act does apply, then his sole recovery is not an action for tort against the third person as found by the trial Judge, but rather for payment under the provisions of Longshoremen's & Harbor Workers' Act benefits and that, under the said act,

the case should be transferred to a Deputy commissioner of the Department of Labor.

This contention of the plaintiff is based upon the provisions of Section 905 of Title 33 of the U. S. Code, the Longshoremen's & Harbor Worker's Act, which provides:

> "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death."

The defendants then contend that this section is applicable to Baltimore Contractors even though the plaintiff, Perry, was the employer of the Underwater Exploration, because of the language of Section 904, which reads as follows:

> "(a). Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer

who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment."

Defendants further contend that as Baltimore Contractors secured payment for its Longshoremen's & Harbor Workers' Act liabilities by taking out its compensation insurance policy with defendant, New Amsterdam Casualty Company, and since Underwater Exploration had never taken out or provided for its Longshoremen's & Harbor Workers' Act coverage, Baltimore Contractors would only become liable under Section 904 of the Act to pay Perry's benefits and since it is liable under the act to pay these benefits whenever demanded, Baltimore Contractors can claim the exclusive liability provision of Section 905 of the Act; and that Section 905 states that such liability is exclusive and in place of all other liability except when the employer fails to secure payment for compensation; and that since the defendant, New Amsterdam Casualty Company, had a policy covering Longshoremen's & Harbor Workers' Act benefits for Perry, it had the duty to pay the benefits when demanded and because of its legal duty, Baltimore Contractors and New Amsterdam can claim the tort immunity of Section 905; and therefore, the question before the Court is whether the general contractor who has covered the employees of the subcontractor will be able to claim the exclusiveness of liability provisions of Section 905.

The defendant then cites the case of *Thomas v. George Hyman Construction Company*, 173 F. Supp. 381 (1959), wherein Judge Holtzoff was the organ of the Court. However, in the Thomas case, the general contractor voluntarily took our workmen's compensation insurance on employees of the subcontractor even though the subcontractor had complied with the statute above cited and had taken out workmen's compensation. The court allowed plaintiff's suit for tort, holding that the employer would not be relieved from any action for negligence as a third party, merely by taking out Workmen's Compensation insurance. The language of the Court in that case is merely dictum and is permissive in view of the fact that the Court held therein as follows:

> "* * * The law does not accord to the general contractor the choice of either carrying workman's compensation insurance, or subjecting himself to liability for negligence. The law requires him to carry insurance only if the subcontractor fails to do so. In such a contingency, the general contractor may well be free of all of the liability if he in fact carried such insurance. * * *"

Therefore, the Thomas case cited by the defendants is not a point appropriate to the case at issue.

The plaintiff, in answering defendants' contention, states that if the plaintiff's employer, Underwater, had secured payment of compensation under the Act, plaintiff would have had two remedies:

(1) A claim against his employer for compensation benefits under the Act; and

(2) An action in law or in admiralty against Baltimore as a third party under Section 933 of the Act.

This is correct. The plaintiff then contends that since Underwater did not secure the payment of compensation, the plaintiff could, if he so chose, elect either to present a claim for compensation benefits against Baltimore under Section 904, or, as in all cases where the employer (in this case Underwater) failed to secure compensation, the employee has an absolute right to elect between a compensation and a tort remedy, and that Section 904 in no way restricted this election to actions against the employer only. Plaintiff further states that if this was not the proposition, the employee would be deprived of his action in tort against the third party merely by the fact that the third party carried Workmen's Compensation insurance on all of the employees of its subcontractors. The plaintiff then points out that, of course, the plaintiff could not recover twice from the contractor, once under the Act and in addition under tort.

It is the opinion of this Court that the reasoning of the plaintiff is by far the sounder and is more within the intent of the Act. There is nothing in the Act which can be construed to permit a third party to deprive an employee of his right of tort action against

it merely by taking out Workmen's Compensation Insurance on the employees of its subcontractor.

It is therefore the opinion of this Court that the second allegation of error of the defendants is without merit.

Defendants' third allegation of error is if the case is a case upon which this Court is called upon to pass questions on Longshoremen's & Harbor Workers' Act, that act, unlike the Jones Act, belongs properly to the Court of the federal system and that the state Court is without jurisdiction and that the plaintiff cannot bring such a suit in the State Court.

At the time of the trial, and also at the time of the argument of this case, there was some question on this matter in view of the decision in the case of *Jackson v. Lykes Brothers Steamship Company,* 185 So. 2d 342 (4th Cir. 1966), affd. 187 So. 2d 441 (1966). However, while the present case was being argued writs of certiari had been granted to the U. S. Supreme Court and this matter has now been resolved by the decision of the U. S. Supreme Court in the case of *Helen Jackson v. Lykes Brothers Steamship Company,* No. 575 on the docket of the Supreme Court of the United States, October Term, 1966, wherein on May 8, 1967, Justice Black as the organ of the Court reversed the judgment of the District Court and the Court of Appeal and remanded the case for trial and further proceedings in the Louisiana Court not inconsistent with its opinion. It is

clear, in view of the Jackson case and in view of the case of *Reed v. The Yaka,* 373, U.S. 410, which was followed in the Jackson case and which the Fourth Circuit had attempted to distinguish in the Jackson case, that the Louisiana courts do have jurisdiction in this matter and that this question has now been resolved and we do not feel that it is necessary to go into detail regarding the hearing in the Jackson case. It is now clear that an action for tort under the Longshoremen's and Harbor Workers' Act would lie in the state court.

Before discussing the fourth specification of error, that is, the matter of quantum, we would like to make reference to the fifth specification which contends that Baltimore and New Amsterdam should be indemnified in the event they are assessed for damages. They base this on the fact that it is clear that if a principal contractor is cast in judgment in favor of an employee of a subcontractor, the principal contractor is entitled to indemnification from the subcontractor. Defendants maintain that the plaintiff was negligent in two aspects, that is, he was guilty of negligence which contributed to the accident and which we have already disposed of and also he was negligent in holding himself and his company out to be fully insured when in fact no insurance was in effect. Again, we have disposed of that fact in concluding that the trial Court was correct in its finding of fact that the plaintiff was working for the defendant with full knowledge by the defendant that the insurance which the plaintiff had sought was not in effect.

On the matter of quantum, we do not feel that the Trial Judge's award of $44,092.55 is either excessive or insufficient and should, therefore, not be disturbed.

For the above and foregoing reasons the judgment of the trial Court is affirmed.

AFFIRMED

APPENDIX C.

OPINION ON APPLICATION FOR REHEARING BY COURT OF APPEAL, FIRST CIRCUIT, STATE OF LOUISIANA:

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

Number 7051

PAUL E. PERRY
Plaintiff-Appellee

versus

BALTIMORE CONTRACTORS, INC. AND NEW AMSTERDAM CASUALTY COMPANY
Defendants-Appellants

ON APPLICATION FOR REHEARING

Before: Lottinger, Reid and Sartain, JJ.

PER CURIAM: Baltimore Contractors, Inc., and New Amsterdam Casualty Company have applied for a rehearing. They cite as error that portion of our original opinion which stated that the deposition of Miles Spinney was not included in the record and therefore the testimony contained therein could not be considered by us. They urge further that the omission of Spinney's deposition was an error on the

part of the Clerk and that a rehearing should be granted and the deposition considered.

For the purpose of this per curiam, we have considered as true those portions of the deposition contained in defendant's brief. In essence, the deposition stands for the proposition that Perry held himself out as an employee of Underwater Exploration Company, Inc., when in truth and fact Underwater Exploration Company, Inc., was not in existence as a corporation at the time of the contract. The net result thereof would make Perry an employee of Baltimore Contractors, Inc. Appellant contends that Perry cannot place a nonexistent corporation (Underwater Exploration Company, Inc.) between himself and the principal contractor (Baltimore Contractors, Inc.) so as to meet the holding in Reed v. The Yaka, 373 U.S. 41, which permitted an employee of a subcontractor to bring an action against the principal contractor for tort under the Longshoreman's and Harborworkers Act. Their further contention is that Perry, as the sole officer and stockholder of Underwater Exploration Company, Inc., assured Baltimore Contractors, Inc. that before the commencement of work, said Underwater Exploration Company, Inc. would have adequate insurance and that because of Underwater's failure to comply with this assurance, defendants are entitled to indemnification against Perry for this misrepresentation.

Accepting as true those portions of Spinney's deposition as set forth in appellant's brief, we must conclude that the same do not change or alter our

original opinion. Under the holding in Jackson v. Lykes Brothers Steamship Company, Inc. decided May 8, 1967, the Supreme Court of the United States held that the Longshoreman's and Harborworkers Compensation Act is not an "exclusive remedy" of an injured marine employee and that the survivor of an employee may sue the employer in tort. It is therefore clear that Perry has a right of action directly against Baltimore Contractors, Inc. for a marine tort and his remedy is not limited to workmen's compensation. Further, Perry's failure to obtain insurance for Underwater Exploration Company, Inc. is not prejudicial to Baltimore Contractors, Inc. in the absence of a showing of negligence on the part of an employee of said Underwater Exploration Company, Inc.

For these reasons the application for rehearing is denied.

APPENDIX D.

DENIAL OF WRIT BY SUPREME COURT OF LOUISIANA:

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

December 13, 1967

No. 48,965

Paul E. Perry
versus
Baltimore Contractors, Inc., et al

In re: Baltimore Contractors, Inc., and New Amsterdam Casualty Company applying for certiorari, or writ of review, to the Court of Appeal, First Circuit, Parish of Terrebonne

Writ refused. On the facts found by the Court of Appeal the result reached is correct.

/s/ JWS
/s/ JBF
/s/ JBH
/s/ WBH

McCALEB, JR., is of the opinion that a limited writ of review should be granted to consider the charge that the quantum of damages is excessive.

SUMMERS, J., is of the opinion a writ should be granted, limited to the question of quantum for there is no finding of fact on that issue.

APPENDIX E.

PERTINENT SECTIONS OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, 33 U.S.C.A. §901 et seq.:

I. § 904. Liability for compensation

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

II. § 905. Exclusiveness of liability

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compen-

sation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

APPENDIX F.

PERTINENT PROVISION OF THE LOUISIANA WORKMEN'S COMPENSATION ACT, L.R.S. 23:1021 et seq.:

§ 1061. Principal contractors; liability

Where any person (in this section referred to as principal) undertakes to execute any work, which is a part of his trade, business, or occupation or which he had contracted to perform, and contracts with any person (in this section referred to as contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; and where compensation is claimed from, or proceedings are taken against, the principal, then, in the application of this Chapter reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the employee under the employer by whom he is immediately employed.

Where the principal is liable to pay compensation under this Section, he shall be entitled to indemnity from any person who independently of this Section would have been liable to pay compensation to the employee or his dependent, and shall have a cause of action therefor.

APPENDIX G.

THE EXTENSION OF ADMIRALTY JURISDICTION ACT, 46 U.S.C.A. § 740:

§ 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided*, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further*, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

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Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1223

PAUL E. PERRY,

Respondent.

versus

BALTIMORE CONTRACTORS, INC., and NEW AMSTERDAM CASUALTY COMPANY,

Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967.

No. 1223.

PAUL E. PERRY,

Respondent.

versus

BALTIMORE CONTRACTORS, INC., and NEW AMSTERDAM CASUALTY COMPANY,

Petitioners.

Brief in Opposition to Petition for Writ of Certiorari.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The following brief is submitted by respondent, Paul E. Perry, in opposition to the application for writ of certiorari filed by petitioners, Baltimore Contractors, Inc. and New Amsterdam Casualty Company.

Petitioners' primary contention is that the trial court and the Court of Appeal erred in awarding damages to respondent rather than restricting his re-

covery to benefits under the Louisiana Workmen's Compensation Act or, alternatively, under the Longshoremen's and Harbor Workers' Compensation Act. Since the locale of the accident and the instrumentality causing the accident are of the utmost importance in determining which law applies, and since petitioners have failed to mention the vital fact that the accident was caused by the negligent and/or incompetent operation of a vessel's gear, respondent deems it necessary to submit his Statement of the Case.

STATEMENT OF THE CASE.

At the time of the accident, October 13, 1959, respondent, a diver employed by Underwater Exploration and Salvage Company, Inc. was working at the bottom of a cofferdam which was being constructed in the Intracoastal Canal, a wide, navigable body of water carrying heavy marine traffic.

The bottom of the cofferdam was the bed of the canal, the top was open. The waters of the Intracoastal Canal had not been withdrawn from the cofferdam, but were being pumped back and forth. (R. 108.)

Alongside the cofferdam and afloat on the navigable waters of the Intracoastal Canal was the Barge WHIRLY II, owned by petitioner, Baltimore Contractors, Inc. and operated by its employees. (R. 104.) The compressor unit providing air to respondent was

stationed on the barge and was in operation. (R. 156.) The barge was equipped with a permanently mounted crane. (R. 104.) Attached to the crane was a clam bucket, which was being used to remove mud from the cofferdam after the divers completed "hand jetting" mud from the sides of the dam.

Notwithstanding the fact that the crane operator knew that no digging operations were to be performed while a diver was working in the waters of the cofferdam (R. 176, 179; 199-200; 209-210) and further knew that respondent was in the water at the time, he lowered the clam bucket and raised respondent from the water clamped between the jaws of the bucket. (R. 172.) Respondent sustained crushing injuries, including nine fractured ribs. After having been raised from the water, respondent was left suspended in air and then dropped back into the water.

The trial court awarded judgment in respondent's favor in the total amount of $44,092.55, which included proven loss of wages for the period of October 13, 1959, through 1963, in the sum of $16,623.60.

The Court of Appeal affirmed, holding, *inter alia*, that the vessel was clearly on navigable waters at the time of the accident and that under *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 83 S.Ct. 1185 (1963) respondent was entitled to recover. The Court of Appeal denied a rehearing and the Louisiana Supreme Court denied petitioners' application for writ of certiorari, following which petitioners retained new counsel to apply for writs to this Court.

ARGUMENT.

Reply to Point I.

Petitioners' contention that respondent's sole remedy is under the Louisiana Workmen's Compensation Act is based on two erroneous premises:

(1) Petitioners' statement that "Perry's injuries occurred while he was walking on the floor of a cofferdam" is factually and legally incorrect. Perry was at all times attached to the vessel by means of his airhoses, which were connected to the compressor unit stationed on the vessel; he was bodily lifted from the cofferdam by the gear of the vessel and was suspended from the vessel. Thus, his injury did not occur on land, as contended by petitioners, but upon navigable waters as held in *O'Keefe v. Atlantic Stevedoring Company*, 354 F.2d 48 (5th Cir., 1965). In the *O'Keefe* case, Curry, a longshoreman, while standing on the dock was bodily lifted therefrom by a metal band suspended from the ship's boom. The winch operator stopped the winch, dropping Curry into the waters of the slip between the vessel and the dock. He sustained a fractured skull and drowned. His widow filed a claim against the employer under the Longshoremen's and Harbor Workers' Compensation Act. The employer denied liability on the ground that the death did not result from an injury "upon navigable waters".

The Court of Appeal rejected defendant's contention holding that:

"The difficult problem is the determination as to the place where the injury occurred. It is the place where the injury occurred that determines whether there is Longshoremen's Compensation coverage. If the ship's boom had swung over the dock, striking and causing the death of Curry, we would not be able to find a basis for recovery under the Act. The place of the injury would have been the dock. It is true that when the causal chain of events commenced, Curry was on the dock and not upon navigable waters. But the beginning of the causal sequence was the lifting of Curry from the dock by the metal band suspended from the ship's boom. The boom was a part of the ship. Curry was lifted from the dock by the gear of the ship and was, within the meaning of the Act, suspended from the ship. He was off the dock and upon navigable waters when injured, and this is true whether his head struck the dock as he was lifted or whether he struck the ship or the dock while swinging from the boom or after he was dropped. We are firmly of the view that Curry sustained his injury over navigable water." 354 F.2d at 50.

(2) Respondent is seeking recovery herein for a maritime tort committed by a vessel on navigable waters. Thus, irrespective of whether the injury occurred on land or on navigable waters, respondent is not limited to seeking recovery under the Louisiana Workmen's Compensation Act. As was held in

Matherne v. Superior Oil Co., 207 F.S. 591 (E.D. La., 1962):

> "Whether the Louisiana Statute is exclusive for compensation purposes is immaterial *so long as maritime jurisdiction is properly invoked.*" (Emphasis supplied.)

That maritime jurisdiction is properly invoked in this case is evidenced by the applicability of the Admiralty Extension Act, Title 46, Sec. 740 of the United States Code, which provides as follows:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, *to person* or property, *caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land* * * *." (Emphasis supplied.)

Petitioners advanced the identical argument before the Court of Appeal, which rejected same holding that:

> "* * * The barge upon which the clam bucket was dropped into the cofferdam, was clearly on navigable waters. It is the opinion of this Court, however, that the case of *Gutierrez v. Waterman Steamship Corporation*, 373 U. S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297 (1963) makes it unimportant whether or not the water in the cofferdam should be or should not be decreed to be navigable waters. In that case, a longshoreman sued the

vessel owner for injuries sustained on the dock and the court held as follows:

'Respondent contends that it is not liable, at least in admiralty, because the impact of its alleged lack of care or unseaworthiness was felt on the pier rather than aboard ship. Whatever validity this proposition may have had until 1948, the passage of the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U.S.C. § 740, swept it away when it made vessels on navigable water liable for damage or injury "notwithstanding that such damage or injury be done or consummated on land." Respondent and the carrier amici curiae would have the statute limited to injuries actually caused by the physical agency of the vessel or a particular part of it—such as when the ship rams a bridge or when its defective winch drops some cargo onto a longshoreman. * * * Nothing in the legislative history supports so restrictive an interpretation of the statutory language. *There is no distinction in admiralty between torts committed by the ship itself and by the ship's personnel while operating it* * * *.' (Emphasis supplied) 83 S.Ct. at 1188.

We, therefore, do not see any merit in defendants' first allegation that the Louisiana Workmen's Compensation Act should apply. * * *" 202 So.2d at 700-701.

The case of *American Export Lines, Inc. v. Revel*, 266 F.2d 82 (4th Cir., 1959), relied upon by petitioners for the proposition that a person injured on the dock (an extension of land) is restricted to the remedies provided under the local compensation act notwithstanding the enactment of the Admiralty Extension Act, is inapplicable. In the instant case, respondent's injury occurred on navigable waters, see, *O'Keefe v. Atlantic Stevedoring Co.*, 354 F.2d 48 (5th Cir., 1965), and not on land. Even more significant, the *American Export Lines* case, *supra*, was impliedly overruled by this Court in *Gutierrez v. Waterman Steamship Corp.*, *supra*.

Petitioners are attempting to distinguish the *Gutierrez* case from the one before the Court on the ground that the work performed in *Gutierrez, supra*, was of maritime concern whereas the work performed by this respondent was of local concern. The distinction between work of so-called local concern and work of general maritime concern has been completely abrogated by this Court in the case of *Calbeck v. Travelers Insurance Company*, 370 U.S. 114, 82 S.Ct. 1196 (1962) as follows:

> "There emerges from the complete legislative history a congressional desire for a Statute which would provide federal compensation for all injuries to employees on navigable waters; * * * The statute's framers adopted this scheme in the Act because they meant to assure the existence of a compensation remedy for every such injury,

without leaving employees at the mercy of the uncertainty, expense, and delay of fighting out in litigation whether their particular cases fell within or without state acts under the 'local concern' doctrine. * * *" 82 S.Ct. at 1200.

"Congress brought under the coverage of the Act all such injuries whether or not a particular one was also within the constitutional reach of a state workmen's compensation law * * *" 82 S.Ct. at 1203.

"* * * It is sufficient to say that Congress intended the compensation act to have a coverage co-extensive with the limits of its authority and that the provision 'if recovery * * * may not validly be provided by State law' was placed in the act not as a relinquishment of any part of the field which Congress could validly occupy but only to save the act from judicial condemnation, by making it clear that it did not intend to legislate beyond its constitutional powers * * * *In the application of the act, therefore, the broadest ground it permits of should be taken.*" 82 S.Ct. at 1205. (Emphasis supplied.)

In conclusion, respondent submits that the accident occurred on navigable waters, thus entitling him to recovery against Baltimore Contractors, Inc., a "third party" within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, and, further, that irrespective of the situs of the injury, respondent is entitled to recover from Baltimore Con-

tractors, Inc., the vessel owner, under the holding of *Gutierrez v. Waterman Steamship Corp., supra.*

Reply to Point II.

The Longshoremen's Act, as distinguished from the Louisiana Workmen's Compensation Act, does not recognize the concept of statutory employment, but treats the general contractor, such as Baltimore, as a "third party", amenable to suit for damages. 33 USC 933.

Petitioners claim that they are not "third parties" and rely on Sections 904 and 905 of the act, which, they claim, grant them immunity from tort liability. Section 904 states as follows:

> "Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908 and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment."

Section 905 provides:

> "*The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee,* his legal representative, husband or wife, parents, dependents, next of kin, and

anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death." (Emphasis supplied.)

These sections evidence the intent of Congress to protect an employee against an irresponsible and insolvent employer by providing that the general contractor shall be liable for and secure the payment of compensation benefits in the event the subcontractor and immediate employer has failed to do so.

Section 905 of the Act specifically states that:

"If an employer fails to secure[1] payment of compensation as required by this chapter, an injured employee * * * *may elect to claim compensation under this chapter or to maintain an action at law or in admiralty for damages on account of such injury or death.*" (Emphasis supplied.)

In construing Sections 904 and 905 with respect to the liability of a general contractor, the Fifth Circuit

[1] Title 33 USC, Section 932 provides that payment of compensation shall be secured either through insurance or by having the employer qualify as a self-insurer by complying with the requirements of the Secretary.

Court of Appeal in the case of *Probst vs. Southern Stevedoring Company,* 379 F.2d 763 (5th Cir., 1967) held:

> "The purpose of §904 is to effectually assure payments of benefits. The general contractor has a secondary, guaranty-like liability. The Act does not make the general contractor the 'employer'. It is only the 'employer' who can get under the immunity umbrella of § 905."

Thus, Baltimore Contractors, Inc. not being the "employer" of the respondent herein, is not entitled to immunity from tort liability.

If respondent's employer, Underwater, had secured the payment of compensation under the Act, respondent would have two remedies:

(a) A claim against his employer for compensation benefits under the Act and (b) an action at law or in admiralty against Baltimore as a "third party" under Section 933 of the Act.

Since Underwater did not secure the payment of compensation, respondent may, if he so elects, present a claim for compensation benefits against Baltimore under Section 904. However, and this is the important point, in all cases where the employer fails to secure the compensation the employee has an absolute right to elect between a compensation and a tort remedy. Section 904 in no way restricts this election to actions against the employer only. Were

it otherwise, an employee would be deprived of his action in tort against a third party by the unilateral action of his immediate employer. The quoted sections of the act do not support petitioners' contention that a contractor's liability under the act ipso facto extinguishes his liability in tort. Of course, there is no question but that respondent cannot recover twice from the contractor, once under the act and, in addition, in tort. However, respondent can elect whether or not he wishes to proceed against the contractor for compensation or for damages.

The case of *Thomas v. George Hyman Construction Company,* 173 F.Supp. 381 (D.C., 1959), relied upon by petitioners, is inapposite from either a legal or factual viewpoint. In that case, both the employer and contractor had provided compensation coverage. The Court rejected the contractor's defense of tort immunity stating that:

> "The law does not accord to the general contractor the choice of either carrying Workmen's Compensation insurance, or subjecting himself to liability for negligence."

The Court did not pass on the issue as to whether or not a general contractor would be immune from tort liability in those cases where the subcontractor failed to provide compensation, but merely stated, in rather loose language, that:

> "In such a contingency, the general contractor may well be free of all other liability if he in fact carried such insurance."

This statement, which does not even amount to dictum, certainly does not support petitioners' argument that an employee can be denied his tort remedy against a third party-general contractor merely because his immediate employer failed to carry insurance. The Longshoremen's Act, like the Louisiana Compensation Act, has to be liberally construed. If Congress had meant to grant immunity to a general contractor in such a case as this, they would have done so by express language. Not having granted such immunity, the only legal and equitable interpretation of Sections 904 and 905 would dictate that the employee has a right to elect his remedy and proceed against the contractor for damages.

Finally, it should be noted that the Longshoremen's and Harbor Workers' Compensation Act does not provide the exclusive remedy even as between an employee and his employer. In those cases, where the employer is also the owner and/or operator of the vessel, the employee has an absolute right to sue for damages, notwithstanding the fact that the employer has provided payments under the act. *Jackson v. Lykes Bros. Steamship Company,* 386 U.S. 731, 87 S.Ct. 1419 (1967).

In conclusion, it is submitted that a general contractor is a "third party" under Section 933 of the Longshoremen's Act and, as such, amenable to suit in tort. Alternatively, even if the general contractor were held to be the "employer" of the respondent, a holding which would be in direct conflict with the explicit language of the Act, respondent would, never-

theless, be entitled to bring an action for damages against Baltimore Contractors, Inc. as the owner and operator of the vessel, the WHIRLY II, under the holding of this Court in *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 731, 87 S.Ct. 1419 (1967).

Reply to Point III.

Petitioners' final contention that they are entitled to indemnification under the *Ryan* doctrine is completely and totally without merit. At no time, through the pendency of this litigation, which commenced on May 12, 1960, almost eight years ago, did petitioners ever contend in pleadings or in argument that they were entitled to such indemnification.

Reference to the pleadings will show that petitioners filed a third-party demand against Underwater Exploration Company, Inc. and Paul Perry, in which they allege that the only relief afforded respondent is under the Louisiana Workmen's Compensation Act and in which they seek indemnification from third-party defendants under the provisions of Louisiana Revised Statutes, Title 23, Section 1063. Since the judgment awarded respondent in the instant case is not for benefits under the Louisiana Workmen's Compensation Act, the third-party petition was properly denied.

Not only is the demand for indemnification improper, in that it is being raised here for the very first time[2] there is not a scintilla of evidence

[2] *Neely v. Martin E. Eby Construction Co.*, 87 S.Ct. 1072 (1967) to the effect that this Court will not normally consider issues which have not been presented to the Court of Appeal.

which would support petitioners' contention that Underwater Exploration Company, Inc. breached any implied warranty of workmanlike service. On the contrary, the evidence conclusively shows that petitioner, Baltimore Contractors, Inc. had expressly agreed not to conduct any digging operations while a diver was working in the cofferdam, and that they breached such agreement in total disregard of the safety of respondent herein.

CONCLUSION.

In conclusion, respondent submits that the judgment below is correct and that the application for writ of certiorari should be denied.

Respectfully submitted,

FRANK S. NORMANN,
DAVID R. NORMANN,
MARGOT MAZEAU.

CERTIFICATE.

I, Frank S. Normann, a member of the bar of this Court, do hereby certify that I have this day served a copy of the above and foregoing brief to petitioners' counsel of record, Benjamin W. Yancey, Esq. and G. Edward Merritt, Esq., by mailing a copy thereof, postage prepaid, to them at their offices at New Orleans, Louisiana, on this ..... day of March, 1968.

FRANK S. NORMANN.